WISCONSIN SUPREME COURT
CALENDAR AND CASE SYNOPSES
SEPTEMBER 2014

The cases listed below will be heard in the Wisconsin Supreme Court Hearing Room, 231 East, State Capitol. This calendar includes cases that originated in the following counties:

Milwaukee
Monroe
Kenosha
Outagamie
Shawano
Winnebago

THURSDAY, SEPTEMBER 4, 2014

9:45 a.m.	-	12AP2044-CR	State v. Myron C. Dillard
10:45 a.m.	-	12AP641	Julie A. Augsburger v. Homestead Mut. Ins. Co .
1:30 p.m.	-	11AP1803-CR	State v. General Grant Wilson

TUESDAY, SEPTEMBER 9, 2014

9:45 a.m.	-	12AP523-CR	State v. Alvernest Floyd Kennedy
10:45 a.m.	-	11AP1673-CRNM	State v. Cassius A. Foster
1:30 p.m.	-	12AP1593-CR	State v. Michael R. Tullberg

WEDNESDAY, SEPTEMBER 10, 2014

9:45 a.m.	-	12AP1818-CR	State v. Ramon G. Gonzalez
10:45 a.m.	-	12AP2784	118th Street Kenosha, LLC v. Wisconsin DOT
1:30 p.m.	-	12AP1827-D	Office of Lawyer Regulation v. John J. Carter

FRIDAY, SEPTEMBER 12, 2014

9:45 a.m.	-	12AP2521	Frederick W. Preisler v. Kuettel's Septic Service, LLC
10:45 a.m.	-	{13AP691	Wilson Mutual Ins. Co. v. Robert Falk
		{13AP776	Wilson Mutual Ins. Co v. Robert Falk

TUESDAY, SEPTEMBER 23, 2014

9:45 a.m.	-	13AP127-CR	State v. Raheem Moore
10:45 a.m.	-	13AP544	Bank of New York v. Shirley T. Carson
1:30 p.m.	-	12AP2566	Sohn Manufacturing Inc. v. LIRC

In addition to the cases listed above, the following case is assigned for decision by the court on the last date of oral argument based upon the submission of briefs without oral argument:

- 12AP2350-D Office of Lawyer Regulation v. Richard W. Steffes

The Supreme Court calendar may change between the time you receive these synopses and when the cases are heard. It is suggested that you confirm the time and date of any case you are interested in by calling the Clerk of the Supreme Court at 608-266-1880. That office will also have the names of the attorneys who will be arguing the cases.

Media interested in providing camera coverage, must make requests 72 hours in advance by calling media coordinator Rick Blum at (608) 271-4321. Summaries provided are not complete analyses of the issues presented.

WISCONSIN SUPREME COURT
THURSDAY, SEPTEMBER 4, 2014
9:45 a.m.

This is a review of a decision of the Wisconsin Court of Appeals, District II (headquartered in Waukesha), which reversed a Winnebago County Circuit Court decision, Judge Scott C. Woldt, presiding.

2012AP2044-CR State v. Dillard

This case examines whether Myron C. Dillard, a defendant in an armed robbery case, may withdraw his plea after discovering that a potential penalty enhancer that was dropped as part of a plea agreement could not have applied to his situation anyway.

Some background: On Dec. 4, 2009, a man entered and sat down in the front passenger seat of a car being driven by a woman. Brandishing a gun, the man instructed the woman not to look at him and to drive around a certain area. He asked her some questions about her personal life and required her to hand over her money. The man ultimately directed the woman to park near some apartments, at which point he exited the vehicle while the woman counted to 30 pursuant to the man's direction.

Dillard was arrested for these crimes and charged with one count of armed robbery, as a persistent repeater, and one count of false imprisonment, as a repeater (not a persistent repeater). With the persistent repeater enhancer, the armed robbery count required a sentence of life imprisonment without the possibility of release to extended supervision. Without the persistent repeater enhancer, the armed robbery count carried a maximum sentence of 40 years, 25 years of which could be allocated as initial confinement. The false imprisonment charge, with the repeater enhancement, carried a maximum sentence of 10 years, with a potential seven years of initial confinement.

Although the criminal complaint attached the persistent repeater enhancer to the armed robbery count, it is undisputed that it was improper to do so. The persistent repeater enhancer requires two or more previous convictions that occurred on different dates. Wis. Stat. § 939.62(2m)(b)1. All of Dillard's prior convictions occurred on the same date.

Neither Dillard's counsel, nor the prosecutor, nor the circuit court, however, was aware that the persistent repeater enhancer was a legal impossibility. All thought throughout the proceedings in the circuit court that the enhancer was properly pled.

On the assumption that the persistent repeater enhancer was valid, the state offered a plea deal to Dillard under which he would plead guilty to the armed robbery count in exchange for the state (1) dismissing the persistent repeater enhancer on that count, (2) dismissing outright the false imprisonment count, and (3) recommending a sentence that included eight years of initial confinement. Prior to or at the time of the plea offer, the state also filed a motion seeking to introduce other acts evidence that Dillard had previously engaged in a similar incident that had ultimately included a sexual assault.

Dillard's attorney recommended that he seriously consider accepting the plea offer. Counsel testified later at the post-conviction motion hearing that her recommendation rested in part on the removal of the persistent repeater enhancer, which took the life sentence off the table, and in part on other factors, including the prospect of the state being allowed to introduce the other acts evidence. Dillard accepted the plea offer and pled guilty to the armed robbery count.

Although the state made the agreed-upon recommendation for eight years of initial confinement, the circuit court imposed the maximum sentence of 25 years of initial confinement and 15 years of extended supervision.

Dillard filed a post-conviction motion for plea withdrawal. He argued that his plea was unknowing and involuntary because he had been under the impression that if he did not take the plea he was subject to receiving a life sentence without release to extended supervision if found guilty. He also argued that the failure of his trial counsel to advise him regarding the invalidity of the persistent repeater enhancer had constituted ineffective assistance of counsel.

After conducting an evidentiary hearing, the circuit court denied the motion. Relying in part on trial counsel's testimony that she would have recommended accepting the plea offer even if the persistent repeater allegation had never been included in the complaint, the circuit court indicated that Dillard was seeking plea withdrawal simply because the circuit court had imposed a lengthier sentence than had been contemplated in the agreed-upon recommendation.

The Court of Appeals reversed Dillard's conviction and remanded the case to the circuit court for further proceedings.

The state appealed, asking the Supreme Court: Can a defendant demonstrate manifest injustice warranting plea withdrawal where he fully understood the consequences of the charges to which he pleaded, but where (a) the parties later realized that a penalty enhancer dropped as part of the bargain could not apply to the defendant, and (b) the defendant admitted his dissatisfaction with his sentence compelled his motion for plea withdrawal?

Does a defendant demonstrate prejudice (for purposes of an ineffective assistance of counsel claim) based on counsel's failure to recognize that a dropped penalty enhancer could not have applied to him, where other portions of the plea bargain and other factors would have nevertheless compelled the defendant to accept the plea deal?

WISCONSIN SUPREME COURT
THURSDAY, SEPTEMBER 4, 2014
10:45 a.m.

This is a review of a decision of the Wisconsin Court of Appeals, District II (headquartered in Waukesha), which affirmed a Winnebago County Circuit Court decision, Judge Gary R. Sharpe, presiding.

2012AP641 Augsburger v. Homestead Mutual Insurance Co.

This case involves a dispute over liability for a dog bite. The Supreme Court examines whether a man who owned the property where the dog bite occurred could be held liable, even though he did not live on the property, and was not there when the dog bite occurred. The central legal questions to be considered by the Supreme Court are whether the homeowner "harbored" the dogs pursuant to Wis. Stat. § 174.001(5), and whether he is considered an owner of the dogs for purposes of Wis. Stat. § 174.02.

Some background: George Kontos purchased a home in Larsen, Wis. for the dual purpose of living there after he retired and providing a place for his daughter, Janet Veith and her husband and daughter to live that was closer to Kontos and his ill wife. The Veiths did not pay any rent. Kontos lived in another home several miles away but visited the Veiths on multiple occasions.

At the time of the alleged dog attack on Julie Augsburger, Kontos knew there were at least five dogs living on the property. In her deposition, Augsburger said that on at least one occasion prior to the alleged attack, she had been at the property when she observed Kontos discipline the dogs when they were playing roughly. Kontos said this "discipline" amounted to his yelling at the dogs to "knock it off and shut up." Kontos and the Veiths agreed that Kontos could have told the Veiths they could not keep the dogs at the property.

On June 21, 2008, Augsburger went to the property to visit Veith, whom she had known for many years. The Veith daughter told Augsburger that Janet was in the barn and helped her open the gate to a fenced in area leading to the barn. Augsburger said that when she entered the fenced area there were no dogs present, but when she walked toward the barn, several of the dogs attacked her, leading to her claim of injury.

Augsburger sued Kontos and the Veiths. Kontos and Augsburger both moved for summary judgment on the issue of whether Kontos "harbored" the dogs. The circuit court granted summary judgment in favor of Augsburger

Kontos appealed, and the Court of Appeals, with Judge Paul F. Reilly dissenting, affirmed.

The Court of Appeals noted that § 174.02 subjects an "owner" of a dog to strict liability for injuries it causes. "Owner" is broadly defined in § 174.001(5) to mean "any person who owns, harbors or keeps a dog." The court said it was undisputed that Kontos did not "own" or "keep" the dogs and the dispute resolved around whether he "harbored" the dogs at the time of the alleged attack.

The Court of Appeals reasoned that since Kontos provided shelter and lodging for the dogs just as surely as he did for the Veiths, he harbored the dogs and was a statutory owner of them.

The Court of Appeals said its conclusion was consistent with a recent decision from the Minnesota Supreme Court. In Anderson v. Christopherson, 816 N.W.2d 626 (Minn. 2012), the court concluded that liability as a harborer of a dog was not precluded by the fact that the defendant who owned the home where the dog was receiving shelter and lodging did not live at that location.

The Court of Appeals said although the legislature has not defined "harbor" or "keep," the Wisconsin Supreme Court clarified those terms in Pawlowski v. American Family Mut. Ins. Co., 2009 WI 105, ¶15, 322 Wis. 2d 21, 777 N.W.2d 67.

In that case a homeowner allowed an acquaintance of her daughter to live at her home with two dogs. After having lived in the home for several months, the acquaintance opened the door to the home and his unleashed dogs bolted out. One of the dogs attacked a person who was walking nearby. The plaintiff sued. The homeowner claimed she was not a statutory owner because she did not have dominion or control over the dog when the attack occurred.

In Pawlowski, the Supreme Court held that the homeowner had been a harborer of the dog at the time of the attack and was subject to strict liability because "[s]he allowed the dog to live in her home for several months, affording the dog shelter and lodging."

The Court of Appeals also rejected Kontos' argument that even if he was a harborer of the dogs, public policy considerations should preclude his liability.

In his dissent, Reilly said that in his opinion both the circuit court and the majority erred in finding that Kontos was the statutory "owner" of the dogs. Reilly said the majority's definition of "owner" stretches the interpretation of Ch. 174, Stats.

Kontos says the critical difference between this case and Pawlowski, on which the majority relied so heavily, is that the homeowner in Pawlowski lived in the premises where the dogs were housed.

Augsburger says the Legislature set the policy for dog bite liability when it enacted § 174.02, and the Court of Appeals' decision merely applies well settled Wisconsin law to the facts of this case. Augsburger says the Supreme Court also recently considered similar issues in Pawlowski.

WISCONSIN SUPREME COURT
THURSDAY, SEPTEMBER 4, 2014
1:30 p.m.

This is a review of a decision of the Wisconsin Court of Appeals, District I (headquartered in Milwaukee), which reversed a Milwaukee County Circuit Court decision, Judges Victor Manian and Jeffrey A. Conen, presiding.

2011AP1803-CR State v. Wilson

This case examines whether a man convicted of homicide more than 20 years ago was denied a meaningful opportunity to present a complete defense because the circuit court refused to allow him to introduce evidence that someone else killed the victim.

The Supreme Court reviews a 2013 Court of Appeals' decision summarily reversing General Grant Wilson's conviction on one count of first-degree intentional homicide and one count of attempted first-degree intentional homicide.

Some background: "[T]he Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.'" *See* Crane, 476 U.S. at 690 (citation omitted). This includes "the right to present witnesses in [one's] defense." State v. Denny, 120 Wis. 2d 614, 622, 357 N.W.2d 12 (Ct. App. 1984). "[A]n essential component of procedural fairness is an opportunity to be heard." Crane, 476 U.S. at 690. Evidence that a person other than the defendant committed the charged crime is relevant to the issues being tried, and thus admissible, "as long as motive and opportunity have been shown and as long as there is also some evidence to directly connect a third person to the crime charged which is not remote in time, place or circumstances." Denny, 120 Wis. 2d at 624.

Wilson was convicted of the shooting death of Evania Maric in 1993. In 2010, the Court of Appeals reinstated his right to a direct appeal, ruling that Wilson received ineffective assistance of appellate counsel.

Maric was repeatedly shot with two different guns while she was seated in a parked car in front of an illegal "after hours" club around 5 a.m. on April 21, 1993. Wilson had been romantically involved with Maric. Willie Friend, who was dating Maric, was with her in the car when she was shot. Friend fled without being injured. Friend told police that Wilson opened fire on both of them, killing Maric. Friend was the only person to link Wilson directly to the crime. Wilson denied killing Maric and said he was at home asleep when the murder occurred.

At trial, Wilson's lawyer, Peter Kovac, repeatedly tried to introduce evidence implicating Friend and/or his brother Larnell Friend, who operated the "after hours" club where Maric was killed. Kovac presented a witness named Mary Lee Larson, a friend of Maric's, who had known her since junior high school. Larson testified that in the two months before her death, Maric never said she was afraid of Wilson.

When Kovac asked Larson if she knew whether or not Maric was afraid of Friend, the prosecutor objected and the trial court sustained her objection. Defense counsel then made an offer of proof, the crux of which was that within two weeks of Maric's death, Friend had threatened to kill her if she did not stay "in check" and had slapped her in front of several witnesses. Kovac argued the evidence was relevant because the theory of defense was that it was Friend who was responsible for Maric's death. (Apparently the defense theory was not that Friend personally shot Maric but that he lured her to a place where one or more other people,

acting on his instructions, would shoot her.) The record indicates that at the time of her death Maric was pregnant with Friend's child and the defense posited that Friend wanted to avoid a paternity action and child support award.

Defense counsel also advised the court that another witness, Barbara Lange, could provide similar testimony about Friend threatening Maric. The court denied Kovac's request to present the proposed testimony from Larson and Lange.

The jury reached an impasse after the first day of deliberations but subsequently convicted Wilson of the crimes. He was sentenced to life imprisonment with parole eligibility after 20 years on the homicide count and was sentenced to a consecutive term of 20 years on the attempted homicide count.

Wilson filed a motion seeking sentence modification. He also argued he should be granted a new trial because the circuit court refused to allow him to introduce evidence pointing to a third party perpetrator. The trial court denied that motion without a hearing in 1996. Wilson did not appeal from that order.

In 2010, Wilson, now represented by the State Public Defender's Office, filed a habeas petition (apparently arguing ineffective assistance of appellate counsel under State v. Knight, 168 Wis. 2d 509, 484 N.W.2d 540 (1992)). In September 2010 the Court of Appeals ruled that Wilson had received ineffective assistance of appellate counsel, and it reinstated his right to a direct appeal. Wilson then filed a Rule 809.30 motion in early 2011. The circuit court denied the motion in July 2011, concluding that the evidence Wilson claimed trial counsel should have presented did not sufficiently satisfy the Denny criteria. The Court of Appeals disagreed and reversed the judgment of conviction.

The state appealed to the Supreme Court, asking:

- Did Wilson satisfy the opportunity requirement for presenting third-party-perpetrator evidence under State v. Denny, 120 Wis. 2d 614, 357 N.W.2d 12 (Ct. App. 1984), with respect to Willie Friend?
- If the answer to the first question is "yes," was the error in excluding the Denny evidence harmless beyond a reasonable doubt?

The state says even without the motive evidence Wilson wanted to introduce, the jury knew Friend was at the scene and had a different motive to get rid of Maric. However, the state says the theory that Friend killed her was contrary to the physical evidence. Wilson says the test set forth in Denny for determining whether third-party perpetrator evidence should be admitted in a trial court has been applied numerous times over the past three decades and no reported case has ever questioned the legal viability of the Denny test.

WISCONSIN SUPREME COURT
TUESDAY, SEPTEMBER 9, 2014
9:45 a.m.

This is a review of a decision of the Wisconsin Court of Appeals, District I (headquartered in Milwaukee), which affirmed a Milwaukee County Circuit Court decision, Judge Jeffrey A. Wagner, presiding.

2012AP523-CR State v. Kennedy

This case examines constitutional issues arising from the arrest and conviction of Alvernest Floyd Kennedy on charges of homicide by intoxicated use of a motor vehicle.

The Supreme Court reviews whether field sobriety tests were necessary to establish probable cause to arrest Kennedy for operating while intoxicated (OWI), and whether evidence obtained as a result of the warrantless blood draw was erroneously admitted in violation of Kennedy's right to be free from unreasonable searches and seizures.

Some background: Kennedy was driving a car that struck and killed a female pedestrian he said ran out in front of his car on Fond du Lac Avenue in Milwaukee at about 12:15 a.m. on Aug. 3, 2006.

A nearby Milwaukee Police officer was dispatched to the scene and arrived in less than a minute. She observed a white Chevy Impala facing the wrong way in the eastbound lane of traffic at the end of a long set of skid marks. The car's front end had been damaged, and there was blood on the passenger side of the vehicle. The officer found a woman lying under the passenger side of the vehicle who was still alive, but had suffered severe injuries.

After calling for an ambulance, the officer asked the people standing nearby what had happened. Kennedy handed his driver's license to the officer and advised her that he had been driving the car. There had also been a passenger in Kennedy's vehicle, a friend by the name of Anthony Jones. The officer told Kennedy to stand on the sidewalk until the ambulance came.

Approximately 15 minutes passed from the initial dispatch call until the officer was able to have a more in-depth conversation with Kennedy and Jones. The officer said she noticed Kennedy had glassy and bloodshot eyes, that his speech was slurred, that he was swaying back and forth, and that he smelled of alcohol. Although she believed that Kennedy was intoxicated, the officer did not perform field sobriety tests because her sergeant had arrived and instructed her to take steps to secure the scene.

Two police officers asked Kennedy to sit in the back of a squad car, which he did, although he claims that he did so only due to a show of police authority. Kennedy was not handcuffed and was not told that he was under arrest.

A few minutes later, the victim died. The officer testified that once that had occurred, "it automatically became a blood draw" situation. At 2:07 a.m., the police told Kennedy that he was under arrest. Some of the officers testified that Kennedy was agitated and uncooperative both while he was in the squad car and when the officers took him to a local hospital for a blood draw.

Kennedy initially refused a blood draw. His blood was finally drawn at approximately 3:18 a.m., which was about three hours after the incident. Test results showed a blood alcohol level at that time of 0.216. A state toxicologist testified that Kennedy's blood alcohol level at the time of the collision would have been between 0.246 percent and 0.291 percent.

Kennedy filed a motion to suppress all evidence obtained subsequent to his arrest, arguing that the temporary detention had continued for too long and that there was not probable

cause to arrest him. The circuit court concluded that the length of the detention was reasonable and found that there was probable cause at the time of arrest.

At trial, the jury found Kennedy guilty of homicide by intoxicated use of a vehicle. The court sentenced Kennedy to 11 years of initial confinement and seven years of extended supervision.

Kennedy raised a host of issues on appeal, two of which are raised before the Supreme Court:

- Were field sobriety tests necessary to establish probable cause to arrest Kennedy for Operating a Motor Vehicle While Intoxicated (hereinafter "OWI")?
- Was the evidence obtained as a result of the warrantless blood draw in the instant matter erroneously admitted, in violation of Kennedy's right to be free from unreasonable searches and seizures under the Fourth and Fourteenth Amendments to the U.S. Constitution and Article I, § 11 of the Wisconsin Constitution?

The Supreme Court also may consider whether the draw of Kennedy's blood was performed without a warrant and, if so, whether the warrantless blood draw was constitutional under the U.S. Supreme Court's decision in Missouri v. McNeely, 569 U.S. ___, 133 S. Ct. 1552 (2013).

WISCONSIN SUPREME COURT
TUESDAY, SEPTEMBER 9, 2014
10:45 a.m.

This is a review of a decision of the Wisconsin Court of Appeals, District IV (headquartered in Madison), which affirmed a Monroe County Circuit Court decision, Judges Todd L. Ziegler, presiding.

2011AP1673-CR State v. Foster

This case examines several issues arising from a drunk driving arrest, including whether a warrantless blood draw under the circumstances presented here is constitutional in light of Missouri v. McNeely, 569 U.S., 2013 WL 1628934 (2013). In that case, the U.S. Supreme Court recently held that whether a warrantless blood draw is constitutional depends on an analysis of the exigencies under the particular facts of each case.

Some background: A Tomah police officer pulled Cassius A. Foster's vehicle over at approximately 11:55 p.m. on March 6, 2009, after observing Foster's Pontiac traveling more than 50 miles per hour in a 30-mile-per-hour zone. When the officer reached Foster's vehicle, Foster had difficulty getting his driver's license out of his wallet and told the officer that he had been upset with his female passenger. The officer smelled intoxicants emanating from the vehicle and observed that Foster had bloodshot, glassy eyes and slurred speech. After administering field sobriety tests, the officer performed a preliminary breath test, which showed a reading of .103 on a weak breath. The officer transported Foster to the Tomah Memorial Hospital, where the officer had medical personnel perform a blood draw despite Foster's refusal to consent. The blood draw showed a blood alcohol concentration (BAC) of .112.

The state charged Foster with driving under the influence (sixth offense), given Foster's three prior alcohol-related convictions in Oklahoma and two prior alcohol-related convictions in Texas.

Foster's counsel moved to suppress evidence obtained following the stop of Foster's vehicle, but the motion was denied as untimely. The case was tried to a jury, which found Foster guilty. The circuit court withheld sentence and placed Foster on probation for three years, with one year of conditional jail time.

Foster's post-conviction counsel filed a post-conviction motion alleging that trial counsel had been ineffective for not collaterally attacking the prior Oklahoma convictions on the ground that Foster had not properly waived his right to counsel in those cases. Foster testified at the hearing that he had not knowingly and voluntarily waived his right to counsel. In response, the state introduced certified copies of forms entitled "Notice of Rights," on which Foster had clearly indicated that he was waiving his right to counsel. Given these waiver of rights forms, the circuit court denied Foster's post-conviction motion.

Foster's post-conviction/appellate counsel then filed a no-merit report in the Court of Appeals, and Foster filed a response. Given Foster's stipulation to one of the elements, the testimony of the arresting officer, and the crime lab analyst, the Court of Appeals concluded that the evidence had been sufficient, and it dismissed other arguments raised by Foster.

Subsequent to the Court of Appeals' decision, the U.S. Supreme Court issued its decision in McNeely, which held police must obtain a warrant for a blood draw unless the state can make a particularized showing of exigency.

In addition, Foster raises the following issues:

- Whether there had been an intelligent, knowing, and voluntary waiver of counsel (in Cassius Foster's Oklahoma cases)?
- Whether the waiver of rights form [used in the Oklahoma cases to waive Foster's right to counsel] was valid in demonstrating Foster's understanding of the dangers and disadvantages of self-representation?
- Whether prior convictions should have been admissible to enhance Foster's sentence?

WISCONSIN SUPREME COURT
TUESDAY, SEPTEMBER 9, 2014
1:30 p.m.

This is a review of a decision of the Wisconsin Court of Appeals, District III (headquartered in Wausau), which affirmed a Shawano County Circuit Court decision, Judge James R. Habeck, presiding.

2012AP1593-CR State v. Tullberg

The sole issue in this case is whether exigent circumstances justified a warrantless blood draw from a man police suspected of driving drunk and being involved in a fatal accident. Exigent circumstances may exist when a police officer must take immediate action to effectively make an arrest, search or seizure for which probable cause exists, and thus may do so without first obtaining a warrant.

Some background: A jury found Michael R. Tullberg guilty of homicide by intoxicated use of a motor vehicle, homicide by use of a vehicle with a prohibited alcohol concentration, hit-and-run, causing injury by the operation of a vehicle while under the influence of an intoxicant, causing injury while operating a vehicle with a prohibited alcohol concentration, and resisting or obstructing an officer.

The counts arose out of a one-truck rollover accident in which one man died and two other passengers were injured. The theory of defense was that one of the passengers was driving the truck.

A sheriff's deputy who arrived at the scene five or 10 minutes after the accident saw the pickup truck resting on the driver's side and the body of the dead man pinned under the truck bed. After another five or 10 minutes had passed, an emergency crew and the defendant's father arrived. The father told the deputy the truck belonged to his son and that both his son and a female passenger were on their way to the hospital and that there was a third person they could not locate.

The deputy went to the hospital to investigate the circumstances surrounding the crash. When questioning the defendant, the deputy noticed the defendant's eyes were red and glassy, his speech was slurred, and he smelled of intoxicants. Both the defendant and the female passenger indicated the man had who died had been driving the vehicle, the defendant was in the passenger seat, and the female passenger was in the box portion of the truck. The defendant reported when the truck left the road, he had been wearing a seat belt and the passenger's side air bag deployed.

The deputy noted the defendant had injuries consistent with the deployed airbag, including singed hair on his arm and a distinct odor of airbag residue on his body and clothing. In conversations with an officer still at the accident scene, the deputy learned only the driver's side airbag had deployed. Based on observations of the vehicle in relation to the position of the dead man's body, officers concluded it was unlikely the man who died in the accident had been driving. Based on information gathered from both the accident scene and the hospital, the deputy believed the defendant had been drinking and driving.

By the time the deputy had garnered sufficient information to establish probable cause for a blood draw, he estimated that a little over two and 1/2 hours had passed since the time of the accident. Medical staff indicated the defendant needed to have a CT scan very soon and they

were "real persistent" about this. The deputy testified at the suppression hearing that since he did not want to interfere with the defendant's medical care and he was aware of the diminishing timeframe, he believed he had to make an immediate decision to have the defendant's blood drawn.

Tullberg argues the U.S. Supreme Court, in Missouri v. McNeely, __ U.S. __, 133 S. Ct. 1552 (2013) held that the natural metabolization of alcohol in the blood stream does not present a per se exigency justifying an exception to the Fourth Amendment's warrant requirement for non-consensual blood testing in all drunk driving cases. The Court of Appeals cited McNeely and concluded the totality of the circumstances here supported a finding of exigency.

Tullberg moved to suppress the results of the blood draw, arguing nothing that law enforcement officers learned at the hospital indicated he was impaired by alcohol or was driving at the time the accident occurred.

The Court of Appeals disagreed, saying based on the information from the accident scene and the hospital, the deputy could reasonably believe the defendant had been the driver and had been drinking. The Court of Appeals cited McNeely and concluded the totality of the circumstances here supported a finding of exigency.

WISCONSIN SUPREME COURT
WEDNESDAY, SEPTEMBER 10, 2014
9:45 a.m.

This is a review of a decision of the Wisconsin Court of Appeals, District I (headquartered in Milwaukee), which affirmed a Milwaukee County Circuit Court decision, Judges David H. Hansher and William W. Brash, presiding.

2012AP1818-CR State v. Ramon G. Gonzalez

This case examines whether ordering a defendant to open his mouth and reveal his platinum teeth to the jury violates the Fifth Amendment right against self-incrimination.

Some background: Fredrick Brown was severely beaten by several of his fellow inmates in the Milwaukee County Jail in September 2006. The state charged Gonzalez and another inmate with battery by a prisoner, as a party to the crime (PTAC). Their cases were tried together in a three-day jury trial.

The state called Brown to testify, but he was a reluctant witness and asserted that he had no memory of Gonzalez being involved in his beating. Brown repeatedly told the court during his testimony that he did not wish to testify.

A supervisor at the jail, Sgt. James Criss, testified that within minutes of the attack Brown stated that one of his attackers was housed in cell 10, where Gonzalez was housed.

Finally, the state presented the testimony of Detective Kenneth Mohr, who investigated the beating after it had occurred. Mohr testified, over the objection of the defense, that Brown told him that two inmates (from cells four and 14) had begun attacking him in his cell after accusing him of stealing a radio.

Brown further told Mohr that when he forced his way out of his cell, an inmate with platinum teeth from cell ten began to participate in the beating. During Mohr's testimony, the state asked him whether Gonzalez had dental work consistent with Brown's description of platinum teeth, and Mohr responded that he believed Gonzalez did have such dental work. The prosecutor then asked Mohr whether he had personally seen Gonzalez's teeth, and Mohr responded in the negative.

At that point the prosecutor asked that Gonzalez be required to show his teeth and dental work to the jury so that Mohr could describe whether he had dental work consistent with Brown's description. After an objection by defense counsel and a sidebar conference, the court overruled the objection and ordered Gonzalez to show his teeth to the jury.

Gonzalez did not testify and the defense did not call any other witnesses. The jury found Gonzalez (as well as the co-defendant) guilty. The court subsequently sentenced Gonzalez to a consecutive term of two-and-a-half years of initial confinement and two-and-a-half years of extended supervision.

Gonzalez filed a post-conviction motion for a new trial. He again argued that the circuit court's overruling of his objection to the display of his teeth had violated his Fifth Amendment right against self-incrimination and had generally prejudiced him because platinum teeth are commonly associated with drug dealing and gang affiliation. The post-conviction court denied the motion.

The Court of Appeals affirmed, concluding that the compelled display of Gonzalez's teeth "falls squarely within the category of 'real or physical evidence' that is not protected by the Fifth Amendment."

The Court of Appeals also rejected Gonzalez argument that the forced display of his teeth unfairly caused the jury to associate him with drug dealing and gang affiliation (and thereby led the jury to convict him for being a bad person).

Gonzalez's argument in support of review was primarily that the Court of Appeals' opinion on the Fifth Amendment issue is in direct conflict with a 2001 unpublished Court of Appeals' decision in State v. Smith, 2000AP2947-CR.

In Smith, the defendant chose not to testify but still wanted to display his gold teeth to the jury in order to undercut an undercover officer's report of a drug buy, which made no mention of the drug seller having gold teeth. The trial court ruled that if Smith displayed his teeth to the jury, it would be testimonial, he would be waiving his right not to testify, and he would be subject to cross-examination by the state. Smith did not display his teeth and was found guilty. The Court of Appeals affirmed in Smith.

The state's response to Gonzalez's petition argued that the Court of Appeals' decision is consistent with prior decisions of the U.S. Supreme Court and the Wisconsin Court of Appeals. See, e.g., United States v. Hubbell, 530 U.S. 27, 34-35 (2000); Pennsylvania v. Muniz, 496 U.S. 582, 588-89 (1990); Schmerber v. California, 384 U.S. 757, 764 (1966); State v. Schmidt, 2012 WI App 137, ¶¶6-9, 345 Wis. 2d 326, 825 N.W.2d 521; State v. Hubanks, 173 Wis. 2d 1, 14-16, 20, 496 N.W.2d 96 (Ct. App. 1992).

WISCONSIN SUPREME COURT
WEDNESDAY, SEPTEMBER 10, 2014
10:45 a.m.

This is a review of a decision of the Wisconsin Court of Appeals, District II (headquartered in Waukesha), which reversed a Kenosha County Circuit Court decision, Judges Bruce E. Schroeder, presiding.

2012AP2784 118th Street Kenosha, LLC v. DOT

This case involves a dispute over the loss of a business's driveway entrance following a road construction project near the intersection of I-94 and state Highway 50 in Kenosha, and whether the business owner's method of attempting to recover damages is the appropriate legal remedy under the circumstances.

Some background: The business at issue, 118th Street Kenosha, LLC, owns a four-store shopping center. Before a state Department of Transportation (DOT) reconstruction project, the property had one driveway entrance to the shopping center from a public road, 118th Avenue, and one driveway entrance from a private road that intersected with 118th Avenue.

After the DOT highway reconstruction project, the property continues to have two driveway entrances, but both are from the private road. One driveway entrance is the previously existing entrance, and the second driveway entrance is a newly created entrance. The entrance from 118th Avenue was eliminated because the DOT rerouted the road section where the entrance to the shopping center was located.

In order to create the new entrance from the private road, the DOT took a temporary easement from the property owner along that road. The legal description of the temporary limited easement states that the easement is "to terminate upon the completion of this project or on the day the highway is open to the traveling public, whichever is later." The DOT recorded an award of damages for the easement in the amount of $21,000.

The property owner challenged the award by filing a notice of appeal with the trial court. See Wis. Stat. § 32.05(11). In the course of the ensuing litigation, the property owner sought damages for not just the temporary limited easement itself, but for the loss of access to 118th Avenue caused by the vacation of that street in front of the property. The property owner hired an appraiser, who estimated that the highway relocation project caused a $427,600 loss in property value.

Before trial, the DOT moved in limine to prohibit the property owner from introducing any evidence that it is entitled to compensation "for any item whatsoever other than the temporary limited easement" acquired to create the new access point into the property from the private road. The property owner opposed the motion, arguing that it should be permitted to introduce evidence of the loss of direct access and proximity to 118th Avenue and the related loss in value to the property.

The trial court granted the DOT's motion in limine. The court prohibited the property owner from introducing evidence related to the property owner's loss of access to 118th Avenue.

The trial court stated that this issue is governed by Wis. Stat. § 32.09, "Rules governing determination of just compensation."

The parties then entered into a stipulated judgment which preserved the property owner's right to appeal the trial court's ruling on the motion in limine. The property owner appealed, arguing that the trial court erred in prohibiting it from presenting evidence of the impact that the loss of access and proximity to 118th Avenue had on the fair market value of its commercial property.

In response, the DOT argued that the trial court correctly precluded such evidence because the taking of the temporary easement to create the new private road entrance was a separate and distinct act from the closing and rerouting of the relevant stretch of 118th Avenue and did not result in the property's loss of direct access to 118th Avenue.

The Court of Appeals rejected the DOT's argument. The Court of Appeals held that access to and from 118th Avenue was an incident of ownership that had to be accounted for in determining the compensation due the property owner for the temporary easement. The Court of Appeals said that the property owner should have been allowed to offer evidence of the change in value to its property based on the vacation of 118th Avenue. The Court of Appeals therefore reversed and remanded to the trial court for further proceedings consistent with its decision.

The DOT petitioned for review, raising the following issues for this Court's consideration:

- When valuing a temporary limited easement (TLE) under Wis. Stat. sec. 32.09(6g), is it proper to allow an appraiser to testify about alleged permanent severance damages for the period of time beyond the term of the TLE?
- When valuing a TLE, can a landowner introduce evidence on damages caused by other aspects/phases of a project?

When exercising a police power – like relocating a highway – does DOT need to compensate an abutting landowner for elimination of a connection to a highway, especially where a landowner never had a legal right to access that highway at the location of the connection?

WISCONSIN SUPREME COURT
WEDNESDAY, SEPTEMBER 10, 2014
1:30 p.m.

The Wisconsin Supreme Court is responsible for supervising the practice of law in the state and protecting the public from misconduct by lawyers. Lawyers must follow a code of ethics developed by the Court. When there is an allegation that a lawyer has acted unethically, the Supreme Court's Office of Lawyer Regulation (OLR) investigates, and, if warranted, prosecutes the attorney. A referee - a court-appointed attorney or reserve judge - hears the discipline cases and makes recommendations to the Supreme Court.

2012AP1827-D Office of Lawyer Regulation v. John J. Carter

The only issue on appeal in this lawyer discipline case is whether the referee's recommended discipline of a three-year suspension of Atty. John J. Carter's law license is appropriate.

Some background: Carter was admitted to the Wisconsin Bar in 1974. He currently practices out of his Milwaukee-area home and his second home in Arizona. Carter is blind due to an injury he sustained in 1967 while on duty as a Milwaukee police officer.

After a lengthy legal career without disciplinary problems, Carter faced financial difficulties from a failed business venture he had undertaken in 2005. He concedes that he converted about $72,000 of his client's funds held in trust, and that he lied to his client about the status of the funds. Specifically, Carter concedes that, when his client grew impatient with his failure to disburse the client's funds held in trust, Carter falsely said that he had invested the funds in interest-bearing investments that had not yet matured.

Carter also concedes that he had no written fee agreement with his client, and that when he sent the client a bill – for about $43,000 in fees – he refused to release the client's funds held in trust until he and the client reached an agreement on the payment of his fees. Carter also concedes that he failed to maintain complete trust account records and committed other trust account violations.

The referee's report arises out of a stipulation between the OLR and Carter in which Carter withdrew his answer to the Office of Lawyer Regulation's (OLR) complaint and pled no contest to each of the eleven charged counts of misconduct. After holding a one-day sanctions hearing, the referee issued the report now before the Court.

Instead of a three-year suspension, Carter asks that the Court impose either a public reprimand or, at most, a suspension of "no more than five months and 29 days." Carter does not oppose the imposition of full costs.

WISCONSIN SUPREME COURT
FRIDAY, SEPTEMBER 12, 2014
9:45 a.m.

This is a review of two decisions of the Wisconsin Court of Appeals: District III (headquartered in Wausau), which affirmed an Outagamie County Circuit Court decision, Judge Michael W. Gage, presiding (Preisler v. Kuettel's Septic Service); and District II (headquartered in Waukesha), which reversed a Washington County Circuit Court decision, Judge Todd K. Martens, presiding (Wilson Mutual Ins. Co. v. Robert Falk and Jane Falk).

2012AP2521 Preisler v. Kuettel's Septic Serv.
2013AP691 & 2013AP776 Wilson Mutual Ins. Co. v. Robert Falk and Jane Falk

In these cases, which are not consolidated, the Supreme Court has been asked to settle disputes over the legal nature of excrement: When used as a component of farm fertilizer, is excrement considered a "pollutant" under standard insurance policy pollution exclusions?

Decisions by the Supreme Court are expected to resolve possibly conflicting Court of Appeals' decisions and determine whether there's a distinction for insurance purposes between cow manure and "human manure," when either substance is blamed for contaminating nearby well water.

Farmers commonly use both cow manure and septage containing human excrement as organic fertilizer. In both Wilson Mutual Ins. Co. v. Robert Falk and Jane Falk and Preisler v. Kuettel's Septic Service, the substances are blamed for contaminating drinking wells with nitrates.

In Preisler the Court of Appeals held that "septage" – a combination of water, human urine and feces, and chemicals – was a pollutant. Thus, the insurer did not have to provide coverage when it leached into a nearby drinking well. In Falk, the Court of Appeals held that cow manure is not a pollutant. Thus the insurer had to provide coverage when a cow manure fertilizer application contaminated the neighbor's well.

Some background on Preisler v. Kuettel's Septic Service: The Kuettels are farmers who also run a septic pumping service. Tina and Frederick Preisler, also farmers, live across the road. The two families entered into an agreement to spread septage from the Kuettel's septic business on the Preislers' farm fields as a fertilizer. The Kuettels received authorization from the Wisconsin Department of Natural Resources (DNR) to apply a specific amount of septage on the Preislers' fields. The Kuettels then applied the septage to the Preislers' farm fields for several years. The Kuettels occasionally hired Phil's Pumping and Fab, Inc., to spread septage on the Preislers' farm fields.

In the summer of 2008, the Preislers learned that their well water had elevated nitrate levels that resulted in their cattle dying at an uncharacteristic rate. Septage contains high levels of nitrogen, which is converted to nitrates in the soil. The Preislers installed a new well, after which the cattle deaths abated.

The Preislers filed suit against the Kuettels and their businesses and Phil's Pumping, alleging that Kuettles improperly stored and applied setpage, causing it to leak into the

groundwater, and that Phil's Pumping overspread or improperly spread septage. Numerous insurers were named in or added to the lawsuit.

Each insurance policy included a similarly worded exclusion for pollution. All the policies exclude damage caused by the actual, alleged, or threatened discharge, dispersal, seepage, migration, release, or escape of pollutants.

The trial court ruled that septage was unambiguously "waste" and therefore a pollutant. The court also concluded the Preislers' losses resulted from the "discharge, release, escape, seepage, migration or dispersal" of the septage.

The Preislers and the Kuettels appealed, unsuccessfully. The Preislers, the Kuettels and their business entities, and Phil's Pumping each petitioned for review by the Supreme Court, which considers eight issues raised in the three petitions.

Some background on Wilson Mutual Ins. Co. v. Falk: Robert and Jane Falk are dairy farmers with about 600 head of livestock and more than 1,670 acres of farm land. They fertilized their field with manure from their dairy cows according to a nutrient management plan prepared by an agronomist and approved by the county conservation division. The DNR informed the Falks that the farm's manure had polluted an aquifer and neighboring wells. A child of one of the neighbors had to be hospitalized as a result of exposure to manure-contaminated water.

The DNR provided well replacement grants to at least two of the Falks' neighbors to offset the cost to replace their water wells; these grants were about $10,000 each. The DNR also spent about $10,000 for temporary water supplies for the Falks' neighbors. The DNR sent the Falks a letter stating that it may seek recovery of these costs against the Falks through a referral to the Wisconsin Department of Justice.

The Falks forwarded the DNR's letter to their insurer, Wilson Mutual. Wilson Mutual filed a declaratory judgment action to allow the court to decide if the damages caused by the manure contamination were covered by the farm insurance policy Wilson Mutual issued to the Falks to provide property and personal liability coverage.

The trial court concluded that the pollution exclusion in the farm's policy applied so as to exclude coverage, finding that a "reasonable person in the position of the [dairy farmers] would understand cow manure to be waste." The trial court found that Wilson Mutual had no duty to defend or indemnify the Falks.

The Falks appealed, successfully. The Court of Appeals concluded that the pollution exclusion in Wilson Mutual's farm owners policy does not apply to manure used as fertilizer on a farm. The Court of Appeals reversed the trial court's decision and held that the pollution exclusion clause did not bar coverage.

The Supreme Court reviews issues posed by Wilson Mutual:

- Is manure that contaminates consumable fresh water a "pollutant" under the pollution exclusion in an insurance policy?
- Can an insured's alleged subjective expectation of coverage trump clear and unambiguous policy language?
- Does the Farm Chemicals Limited Liability endorsement in the Wilson Mutual Insurance Company policy issued to the Falks provide coverage for damages from manure that contaminates consumable fresh water?

Decisions by the Supreme Court are expected to determine whether either or both cow manure and human excrement are pollutants for the purpose of determining insurance coverage when a nearby drinking well is contaminated.

WISCONSIN SUPREME COURT
TUESDAY, SEPTEMBER 23, 2014
9:45 a.m.

This is a review of a decision of the Wisconsin Court of Appeals, District I (headquartered in Milwaukee), which affirmed a Milwaukee County Circuit Court decision, Judge David L. Borowski, presiding.

2013AP127-CR State v. Moore

This case examines issues related to the custodial interrogation of juveniles and the criteria for evaluating the voluntariness of a juvenile confession.

A decision by the Supreme Court is expected to clarify the meaning of "refus[al] to respond or cooperate" under § 938.31(3)(c)1.

Some background: Raheem Moore was convicted of second-degree reckless homicide. The events in question took place in 2008, when Moore was 15 years old. Police interviewed Moore twice on Oct. 10, the day he was arrested for a shooting death.

Audio recordings were made of several segments of police interviews as required by Jerrell C.J. State v. Jerrell C.J., 2005 WI 105, 283 Wis. 2d 145, 699 N.W.2d 110 and Wis. Stat. § 938.195(2)(a). During the course of the day, Moore changed his story about his involvement in the shooting several times. Moore first indicated he was not involved, then blamed another man. After the police turned off the recorder at Moore's request, Moore told police that he had fired the fatal shot. Police then decided to surreptitiously record the remainder of Moore's interview, during which Moore gave details about the shooting.

Moore was charged with first-degree reckless homicide. Moore filed a motion to suppress the unrecorded statement, as well as the recorded statement that immediately followed. His motion was denied. Moore subsequently pled guilty to second-degree reckless homicide.

Moore appealed, unsuccessfully.

The Court of Appeals held that Moore made his confession voluntarily, with full knowledge of his rights. The Court of Appeals further held that Moore's unrecorded statement and his subsequent recorded statement were admissible because Moore refused to respond or cooperate unless the police turned off the recorder, as is required for an unrecorded statement of a juvenile to be admissible under §§ 938.195(2)(a) & 938.31(3)(c)1.

The Supreme Court considers two issues presented by Moore: Did the detective's decision to turn off the recorder violate the mandate of In Re Jerrell C.J. and Wis. Stat. § 938.195, thus requiring suppression of (Moore's) unrecorded statement and his subsequent recorded statement; and, was Moore's inculpatory statement, made 11 hours after he was arrested, held incommunicado, and interrogated by two teams of detectives, voluntary?

WISCONSIN SUPREME COURT
FRIDAY, SEPTEMBER 23, 2014
10:45 a.m.

This is a review of a decision of the Wisconsin Court of Appeals, District I (headquartered in Milwaukee), which reversed a Milwaukee County Circuit Court decision, Judge Jane V. Carroll, presiding

2013AP544 Bank of New York v. Carson

This case examines whether Wis. Stat. § 846.102 requires a plaintiff in a foreclosure action to sell subject property "without delay" upon the expiration of the redemption period or merely permit a plaintiff to sell the subject property upon the expiration of the redemption period.

The Supreme Court is expected to consider a potential conflict between the Court of Appeals' decision here and Deutsche Bank Nat'l Trust Co. v. Matson, 2013 WI APP 105, 349 Wis. 2d 789, 837 N.W.2d 178 (petition for review denied). Matson that held that the identical language in Wis. Stat. § 846.103 permits, but does not force, the plaintiff to bring the property to sale and a decision.

The Court of Appeals in this case, held that Wis. Stat. § 846.102 requires the plaintiff in a foreclosure action to sell the subject property "without delay" upon the expiration of the redemption period.

Some background: On Jan. 25, 2011, the Bank of New York (Bank) filed a foreclosure action against Shirley Carson, a 62-year-old widow who was physically and financially unable to care for her residence in Milwaukee. Carson did not file an answer or otherwise dispute the foreclosure. Around the time the Bank filed its foreclosure action, Carson had already vacated the property, and the Bank was aware of this fact.

On April 26, 2011, the Bank registered the property as abandoned with the city of Milwaukee under the city's municipal code which requires lenders who initiate foreclosure actions to inspect the property every 30 days and requiring lenders to maintain abandoned property. On April 29, 2011, the Bank filed a motion for default judgment. The motion affirmed that the property was no longer owner occupied.

The circuit court granted the Bank's motion for default judgment on June 13, 2011. The court signed the order the Bank had provided. The order found the property non-owner occupied and ordered that the property be sold at any time after three months from the date of entry of judgment. The order enjoined all parties from committing waste upon the premises and ordered that the Bank "may take all necessary steps to secure and winterize the property in the event it is abandoned or becomes unoccupied during the redemption period or until such time as this matter is concluded."

Despite receiving a notice from the city reminding it to comply with its duty to inspect the property every 30 days and to maintain the property, the Bank did not maintain it. The redemption period passed, but no sheriff's sale was scheduled. The property was later burglarized and vandalized. On June 26, 2012, the City issued a notice of violation because the vacant house was not maintained in a closed or locked condition.

On Aug. 21, 2012, a city inspector noted boxes, scrap wood and loose trash in the alley and backyard, along with other debris. Carson made monthly payments of at least $25 to the City

toward the fines resulting from the building code violations but could not contribute anything more toward the upkeep of the property.

On Nov. 6, 2012, Carson moved to amend the judgment. She sought an amendment, pursuant to § 806.07(g) and (h), Stats., that the property was abandoned pursuant to § 846.102, Stats. She also sought an order requiring a sale of the property to be made upon the expiration of five weeks from the date of the amended judgment so that the foreclosure would comply with the terms of § 846.102. The Bank opposed the motion, saying neither the statute nor equity permitted the trial court to order it to hold a sale. The trial court agreed that it lacked authority to order a sale of the property. It also construed § 846.102 to mean that only the Bank could elect the five week abandonment period provided in the statute. The court did not reach the question of whether there were grounds for relief pursuant to § 806.07 or whether relief would be equitable in light of the facts of the case. Carson appealed, and the Court of Appeals reversed and remanded.

The Court of Appeals said it was clear that whether or not the five week redemption period may be applied to a particular property depends on the condition of the property, i.e., is it abandoned, not on the plaintiff's preference. Thus, the Court of Appeals concluded that the lower court erred as a matter of law when it concluded that only the Bank could elect the five week abandonment period provided in the statute. The Court of Appeals said, "The trial court could have, given the evidence presented by Carson . . . decided to amend the judgment to a foreclosure of an abandoned property as described by § 846.102." Slip op. at ¶12 (emphasis added).

The Court of Appeals went on to say that the statutory language makes clear that the trial court did have the power to order the Bank to sell the property.

The Bank's principal argument is that the Court of Appeals' decision in this case is in conflict with its prior decision in Matson. The Bank says that the Matson court "construed identical language in a parallel statutory provision '*not* [to] require [the lender] to sell the property at the end of the … redemption period.'"

Carson contends, among other things, that "Contrary to the [Bank's] assertions, the decision does not 'require' a sale. Instead, it informs the circuit court of its authority to order a sale, if it makes an evidence-based determination that the property is abandoned upon the motion of either party or a municipal representative."

WISCONSIN SUPREME COURT
TUESDAY, SEPTEMBER 23, 2014
1:30 p.m.

This is a review of a decision of the Wisconsin Court of Appeals, District II (headquartered in Waukesha), which affirmed a Sheboygan County Circuit Court decision, Judge Terence T. Bourke, presiding

2012AP2566 Sohn Manufacturing v. LIRC

This case examines several issues arising from a worker's compensation claim.

Tanya Wetor was inured while working for Sohn Manufacturing in Elkhart Lake. In August 2009, Wetor was cleaning a die cutting machine in Sohn's print department when her hand was pulled into some metal rollers on the machine, resulting in severe injuries to the hand.

Sohn states that there is no dispute regarding Wetor's injury or the compensatory benefits associated with her injury. The benefits to compensate her for her injuries have been paid by Sohn's insurer. According to Sohn, what is at issue is whether the procedure of the Wisconsin Department of Commerce (Commerce) and the Wisconsin Department of Workforce Development (WDWD) and their apparent reliance on an Occupational Safety and Health Administration (OSHA) standard for imposing an additional 15-percent penalty are preempted by the federal Occupational Safety and Health Act (OSH Act).

Sohn emphasizes that Wetor did not file a formal worker's compensation proceeding. After the accident, however, Commerce, in cooperation with the WDWD, conducted an inspection and investigation regarding Sohn's facility and Wetor's accident.

On March 30, 2010, Commerce issued a report regarding its investigation. The report quoted extensively from a 2001 OSHA interpretation letter, which stated essentially that, although lock out/tag out procedures are not always required for cleaning machinery in the printing industry under OSHA regulations, employees should not be allowed to place any body part within a hazardous area, including "ingoing nip points." The report concluded that the conditions at Sohn were not sufficient to meet the exception for lock out/tag out procedures in OSHA 1910.147.

At the end of the report, there was a box that quoted the OSHA standard, 29 C.F.R. 1910.147(c)(4), as well as the text of the Wisconsin safe place statute. Underneath this box was a one-sentence conclusion: "The facts in this case show cause for a conclusion that the employer failed to be in compliance with the above-mentioned OSHA standards, 29 C.F.R. 1910.147(c)(4)(i) and Wisconsin Statute ss. 101.11 [the safe place statute]."

Sohn claims that on May 26, 2010, the WDWD, sua sponte, issued a letter to Sohn requiring it to pay a 15-percent increase in benefits to Wetor under Wis. Stat. § 102.57. The May 26, 2010 letter relied on the March 30, 2010 report issued by Commerce as the basis for imposing the increase.

Sohn disputed that it was obligated to pay a 15-percent increase and moved for dismissal of the safety violation claim on the grounds that it was preempted and impermissible under applicable law. The administrative law judge (ALJ) denied the motion, stating that Sohn would have to pursue "any constitutional issues" in the appellate courts.

The ALJ proceeded with an administrative hearing on Jan. 25, 2010. The ALJ issued written findings of fact, conclusions of law, and an interlocutory order on Feb. 11, 2010. The

ALJ's decision again relied on both the OSHA standard and the safe place statute in determining that Sohn was liable to pay a "safety violation penalty."

Sohn appealed the ALJ's decision to Labor Industry Review Commission (LIRC), which affirmed the decision and interlocutory order. The LIRC rejected Sohn's argument that the imposition of the safety violation penalty was preempted by federal law. It cited a circuit court decision from 1993 that rejected a similar argument.

Sohn then sought review in the Sheboygan County circuit court, but that court also rejected Sohn's preemption arguments in a 14-page written decision and order.

The Court of Appeals also affirmed the LIRC decision. It concluded that a provision of the OSH Act demonstrated that Congress explicitly preserved worker's compensation laws from preemption. It also determined that the WDWD had not relied on an OSHA regulation as the basis for the additional penalty, but had used the OSHA violation merely as evidence of Sohn's violation of the state safe place statute.

Sohn presents these issues to the Supreme Court:

- May the state of Wisconsin inspect private workplaces for violations of the Wisconsin Safe Place Statute (Wis. Stat. § 101.11(1)) or federal OSHA standards and use the results of such inspections to enforce a safety penalty under Wis. Stat. § 102.57?
- Is the use of federal OSHA regulations to enforce Wis. Stat. § 102.57 allowed under 29 U.S.C. § 653(b)(4)?
- Does Wis. Stat. § 101.01(15)(a) prohibit the state action in this case?